STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 22, 2006
v	No. 260499 Allegan Circuit Court
RONALD BARNETT JONES, Defendant-Appellant.	LC No. 04-013769-FH

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of knowingly or intentionally possessing less than 25 grams of a controlled substance, in violation of MCL 333.7403(2)(a)(v). Defendant was sentenced as an habitual offender, third offense, MCL 769.11, and was sentenced to 30 months, 15 days to 8 years' imprisonment.

On appeal, defendant argues that he was denied the right to a speedy trial in violation of MCL 780.131 and MCR 6.004(D), as well as the United States Constitution and the Michigan Constitution, US Const Am VI; Const 1963, art 1, § 20, because he was not tried until 187 days after his arrest. The determination whether a defendant was denied a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). The trial court's factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to de novo review. *Id.*

In the trial court, defendant specifically rejected that he was making a speedy trial claim based on the 180-day rule, MCL 780.131. His argument was based entirely on constitutional grounds. Therefore, his statutory argument has been waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) ("One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error").

Although we conclude that defendant's statutory claim of a 180-day violation, MCL 780.131, was waived, this Court notes that defendant was not tried in violation of that rule. The 180-day rule "provides that 'the Department of Corrections must deliver a written notice of incarceration and request for disposition 'to the prosecuting attorney . . .'" in order for the time to run. *People v Williams*, 475 Mich 245, 256; 716 NW2d 208 (2006); see also MCL 780.131(1). Here, defendant was not incarcerated with the Department of Corrections until June 10, 2004.

Defendant was tried less than 180 days after that time. Thus, regardless when the notification was provided by the Department of Corrections, assuming the notice was provided, it had to have been after June 10, 2004. Defendant was timely tried under MCL 780.131.

The federal and state constitutions guarantee criminal defendants the right to a speedy trial without reference to a fixed number of days. US Const, Am VI; Const 1963, art 1, § 20; *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). When a defendant claims a violation of this right, the trial court must consider four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) any prejudice to the defendant. *Id.* at 112. When the delay is less than eighteen months, the defendant must prove prejudice. *Id.* "A delay of six months is necessary to trigger further investigation when a defendant raises a speedy trial issue." *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). Prejudice is presumed if there is a delay of more than 18 months, but defendant must show actual harm for a lesser delay. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972). Defendant's trial was delayed more than six months from his arrest, which triggers further investigation into his claim, but defendant must show actual harm in order to obtain relief based on constitutional speedy trial grounds.

When considering the reasons for delay, each delay period is examined and attributed to the prosecutor or the defendant. *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). Unexplained delays are attributable to plaintiff. *Id*. Scheduling delays and delays caused by the court system are also attributed to plaintiff, but should be given a neutral tint and only minimal weight. *Gilmore, supra* at 460. Delays caused by the adjudication of defense motions are attributable to defendant. *Id*. at 461.

Here, defendant was arrested on May 29, 2004. He subsequently delayed his initial June 2, 2004, arraignment by one day because he "would not cooperate with bailiff". Additionally, defendant filed a motion to quash and for a *Walker*[1] hearing after the pre-trial conference on August 4, 2004. Those motions were heard 20 days later, on August 24, 2004. Therefore, of the approximate 187 days defendant awaited between his arrest and his trial, 21 days were attributable to defendant.

Defendant asserted his right to a speedy trial by moving to dismiss on November 30, 2004. However, the order setting the trial date as December 1, 2004, was entered on September 2, 2004. There is no evidence in the record showing that defendant objected to the trial being set at that time, nor at any time until the day before trial on November 30, 2004. Because the trial date was set in September, defendant could have objected much earlier, but chose not to do so. A defendant's failure to promptly assert his right to a speedy trial weighs against his subsequent claim that he was denied the right. *People v Rosengren*, 159 Mich App 492, 507-508; 407 NW2d 391 (1987).

Given that defendant chose not to timely assert his right and that he contributed to the delay, his claim of the deprivation of a speedy trial does not warrant relief. More importantly,

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[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

defendant cannot show any prejudice from the minimal delay. Two types of prejudice can be experienced while a defendant is awaiting trial: prejudice to the person due to the deprivation of civil liberties, and prejudice to the defense due to an impairment of a defendant's ability to defend himself. *Gilmore*, *supra* at 461-462. The latter is the more crucial prejudice when assessing a speedy trial claim. *People v Ovegian*, 106 Mich App 279, 285; 307 NW2d 472 (1981). A general allegation of prejudice, such as an unspecified loss of memory or evidence, is insufficient to establish this crucial prejudice. *Gilmore*, *supra*, at 462; *People v Cooper*, 166 Mich App 638, 655; 421 NW2d 177 (1987).

Here, defendant claims on appeal that he suffered prejudice because of his increased anxiety and because his incarceration time before trial was "dead time".[2] At the motion hearing below, defendant also argued prejudice due to a loss of wages, loss of freedom, and because he was unable to assist in his defense. Of these claimed prejudices, all but one are civil liberties claims. Specifically, defendant's claims of dead time, loss of freedom, loss of wages, and anxiety are civil liberty losses. With respect to those losses, defendant does not support his claim of lost wages or "increased anxiety." With respect to the more crucial inquiry, his generic claim that his defense was possibly impaired is not supported. There is no claim of unavailable witnesses, loss of evidence, or other specified prejudice to his defense. His allegation is a general allegation, which is insufficient to establish prejudice. *Gilmore*, *supra* at 462; *Cooper*, *supra* at 655. Balancing the factors set forth in *Cain*, *supra* at 112, the trial court properly denied the speedy trial motion. Defendant has failed to support his claim that his right to a speedy trial was violated.

Next, defendant argues that the evidence against him was insufficient to prove beyond a reasonable doubt that he is guilty. We disagree.

In reviewing a claim that evidence was insufficient to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). In a sufficiency of the evidence claim, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). Moreover, the prosecutor need not negate every reasonable theory of a defendant's innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *Wolfe*, supra at 514-515; People *v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Credibility determinations are not to be resolved by the reviewing court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Defendant's argument that Elroy Jones' letter and testimony negates plaintiff's entire case is without merit because the evidence refuting defendant's involvement merely created a factual question to be resolved by the jury. The jury was not required to believe Elroy's testimony, but only weigh its credibility along with all the other evidence. Defendant essentially

[2] Serving time without receiving credit because he was on a parole hold.

maintains that Elroy had to be viewed as credible. Although Elroy testified that the cocaine was his, plaintiff presented evidence that the cocaine was found near defendant, and defendant admitted ownership of the crack pipe found with the cocaine and admitted that he had used cocaine within the past twelve hours. This evidence, viewed in the light most favorable to plaintiff, could lead a rational trier of fact to find that defendant possessed the cocaine. *Nowack, supra* at 400 ("'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'").

Finally, Defendant argues that there is no support for the 10 points scored under OV 14, MCL 777.44, because he was not a leader in a multiple offender situation. We disagree.

A sentencing court has discretion with respect to the scoring of offense variables, provided that the record supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). OV 14 is scored at ten points where, considering the entire criminal transaction, the offender was a leader in a multiple offender situation. MCL 777.44(1)(a); *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004), lv gtd 474 Mich 1099 (2006).

Defendant argues that the offenses for which he was charged and convicted were offenses personal to the individual. Defendant further argues that other individuals were not charged with the same offense relative to these circumstances and that there is no support for finding defendant to be the leader of a multiple offender situation.

The record provides ample support for the conclusion that defendant was a leader in a multiple offender situation. Not only was defendant the primary user of the car, but he allowed his brother, Elroy, to drive, and the trial court noted that Elroy's testimony tended to demonstrate that he was "a little challenged mentally." The record indicates that defendant was the only one competent enough to lead this illegal transaction.[3] There was also evidence that defendant admitted that he and Elroy were exchanging drugs for sex. Defendant, Elroy, and the female in the car were implicated in the commission of crimes, regardless whether they were charged for those crimes. A reasonable inference arising from this evidence is that defendant was the leader, and thus the evidence was sufficient to support the trial court's ruling. Accordingly, we reject defendant's argument that the trial court erred in scoring OV 14.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Donald S. Owens

[3] Defendant offers no authority to support his contention that he was not a leader in this criminal transaction. We find the reasoning in *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 2006 (Docket No. 259434) persuasive where the defendant in a home invasion was found to be a leader because "he was older and more experienced and because his car was used."